

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

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November 21, 2003

Representative Pettis:

I have had a number of conversations with Trisha Pugel of the Wisconsin Innkeepers Association to flesh out some of the details that were left out of the drafting instructions that I needed to complete the draft. A number of issues still need to be resolved, so Trisha and I thought that it would be best to produce a preliminary draft for your initial review. Some of my questions are contained in the body of the draft, as “\*\*\*\* NOTES.”

Another issue that needs to be resolved is who should appoint the members of the Destination Marketing Organizations (DMOs). As drafted, municipal room tax revenues are forwarded to DMOs or, in some cases, other nonprofit entities. These private entities spend the room tax revenues they receive on loosely-specified purposes. See ss. 66.0615 (1m) (g) 4. b. and (h) 3. b.

The problem I see with this, and which I raised with Trisha, is that there is really no public oversight or direction as to how this public money is being spent. I added a reporting requirement in ss. 66.0615 (1m) (g) 4. c. and (h) 3. c., but the governing body of a DMO or other nonprofit entity under sub. (1m) (h) is not accountable to any public official — the members of the board are appointed by their organizations.

One problem I see with this lack of oversight is that someone could argue that such a system violates that part of the public purpose doctrine which requires that the taxing jurisdiction that imposes a tax must be the taxing jurisdiction that spends the tax's proceeds. See *Brodhead v. City of Milwaukee*, 18 Wis. 658, 671 (1865); *State ex. rel New Richmond v. Davidson*, 114 Wis. 563, 757 (1902); *Owen v. Donald*, 160 Wis. 21, 125 (1915); *State ex. rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 183 (1938); *State ex rel. American Legion 1941 Con v. Corp. v. Smith*, 235 Wis. 443, 451 (1940); *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391 (1973); *Buse v. Smith*, 74 Wis. 2d 550, 577 (1976) and *Sigma Tau Gamma Fraternity House v. City of Menomonie*, 93 Wis. 2d 392, 412–413 (1980). As drafted, the unit of government that raises the tax isn't really spending the tax's proceeds — the proceeds are being spent by a separate, nongovernmental entity over which the unit of government that imposed the tax has no control.

Trisha agrees that this lack of public oversight of what may be considerable amounts of public money may be a problem, but she wasn't sure how her organization would like to solve the problem or what your intent is on this issue. We agreed that I would just

produce a preliminary draft for your review and that a future draft would address this issue.

It is also possible that if this bill becomes law, a city or village that imposes a room tax could challenge the bill as a violation of its constitutional and statutory home rule powers because the bill requires that cities, villages, and towns forward their room tax revenues to a nonprofit organization (towns, however, do not have these home rule powers.)

Article XI, section 3, of the Wisconsin Constitution, as well as ss. 61.34 (1) and 62.11 (5) of the statutes and numerous decisions of the Wisconsin Supreme Court, give cities and villages extensive home rule authority. This constitutional provision “makes a direct grant of legislative power to municipalities” by authorizing them to determine their own local affairs, subject to the constitution and legislative enactments of statewide concern. See *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526 (1977), citing *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 637 (1926).

The provision also stands for the proposition that the state legislature is limited “in its enactments in the field of local affairs of cities and villages” (*Michalek*, 526 citing *Ekern*, 638) and cannot prohibit a city or village from acting in an area that solely involves local affairs and that is not a matter of statewide concern. Although this bill would affect all cities and villages equally, it could be argued that requiring a city or village to give all of its room tax revenues to a nonprofit organization, over which the city or village has no control, violates Article XI, section 3, of the constitution on the grounds that how a city or village spends its own money generated by its own local tax is an issue of local affairs and not a matter of statewide concern.

You should know that even if this bill becomes law, a city or village may not be subject to its provisions. In some cases, if a state law intrudes on an area of local concern, a city (or village) may elect not to be governed by the law. See *Ekern*, 642.

There is one other problem I see with the draft. The nonstatutory section of the bill dissolves commissions, as defined under s. 66.0615 (1) (a) of the statutes, and requires them to terminate contracts that they may have with nonprofit organizations that provide staff, development, or promotional services for the tourism industry. See the definition of “tourism entity” in s. 66.0615 (1) (f). This could lead to the bill being challenged as possibly violating the federal and state constitutional prohibitions against the legislative impairment of contracts. [See article I, section 10, of the U.S. Constitution and article I, section 12, of the Wisconsin Constitution.] It should be noted, however, that “[t]he constitutional proscription against impairment of the obligation of contract is not absolute.” *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 553 (1983), citing, in part, *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 428 (1934). “Under certain circumstances the obligation of contract may be ‘obliged to yield to the compelling interest of the public — the exercise of the police power.’” *Cannon* at 554, citing *State ex. rel. Building Owners v. Adamany*, 64 Wis. 2d 280, 292 (1974).

In general, when a court determines whether challenged legislation interferes with the constitutional protections afforded contracts, the court must determine whether the legislation impairs an existing contract, whether the impairment is substantial and

whether the legislative purpose justifies the impairment. See *Laskaris v. City of Wisconsin Dells*, 131 Wis. 2d 525 (Ct. Apps., 1986) and *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 103 S. Ct. 697 (1983).

I have not conducted exhaustive research on this topic and it is impossible to predict how a court would decide a challenge brought against this bill, should it become law, but I believe that you should at least be aware of this issue. Please let me know if you have any further questions on this topic.

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